

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>01-11989</u>
Golf Augusta Pro Shops, Inc.,)	Number <u>01-11990</u>
and Golf Augusta Pro Shops)	Substantively Consolidated
of Pennsylvania, L.L.C.)	Estates
)	
Debtors)	FILED
_____)	2003 AUG 28 P 3:12

ORDER ON APPLICATION FOR INTERIM ATTORNEY'S FEES

Louis Saul, in his capacity as attorney for the Chapter 11 debtors in possession, by application seeks an interim award of attorney's fees. The Official Committee of Unsecured Creditors and the United States Trustee objected to the application. Following hearing and pursuant to findings set forth on the record I enter this Order in favor of Mr. Saul's application.

Golf Augusta Pro Shops, Inc. and Golf Augusta Pro Shops of Pennsylvania ("Debtors") filed Chapter 11 cases on July 3, 2001. On December 14, 2001 the cases were substantively consolidated. Prior to the bankruptcy filing, the Debtors paid \$20,250.00 to Mr. Louis Saul. Debtors also agreed to compensate Mr. Saul at the rate of \$250.00 per hour. Mr. Saul has received a total of \$90,000.00 from

the Debtors.¹ The Chapter 11 cases were converted to Chapter 7 cases on July 30, 2002. The fee application requests approval of legal fees totaling \$177,007.50 for Mr. Saul's work in Debtors' Chapter 11 and Chapter 7 cases.

At the hearing, I awarded Mr. Saul interim attorney's fees in the amount of \$85,000.00.

Whether a fund paid to counsel by a debtor in a case is property of the estate depends on the nature of that fund. A true "retainer" in the context of bankruptcy is a fee paid to the attorney for all legal services to be rendered in that case. In re Dees Lodging, 158 B.R. 302 (Bankr. S.D. Ga. 1993) *citing* In re Georgian Arms Properties, Chapter 11 Case No. 89-10313, slip op. At 4 (Bankr. S.D. Ga. March 1, 1990) (Dalis). Such "retainer" is immediately earned by the attorney and is never property of the estate. Id. A payment given to secure, at least partially, the future services of an unknown amount to be rendered in the bankruptcy case is not fully earned pre-petition and remains property of the estate until awarded to the attorney by court order. Id.; In re Chicago Lutheran Hospital Association, 89 B.R. 719, 734 n.4 (Bankr. N.D. Ill. 1988).

In determining the true nature of a "retainer" agreement, absent an understanding between the debtor and debtor's attorney that the payment to the attorney made prior to the filing of the

¹ Mr. Saul received an additional \$70,000.00 from the debtor post-petition.

Chapter 11 case was a flat fee for all services provided in connection with the bankruptcy petition, the money paid is a payment to secure the payment of past and future services rendered by the attorney in connection with the case. Those funds are property of the estate until awarded by the court. Dees Lodging, *supra*, citing Georgian Arms Properties, *supra*.

The Statement of Attorney Compensation filed by Debtors' attorney states that the Debtors have paid to the attorney \$20,000.00 and further provides that Debtors agree to pay \$250.00 per hour for the attorney's services. This type of agreement is one to secure future payment for an unknown amount of services to be rendered in the case. Accordingly, the money given to Debtors' attorney remains property of the estate until approved by this Court.

An attorney who received a fund of money to secure future payment of attorney's fees becomes a secured creditor with a possessory perfected security interest in those monies to the extent that the fund covers the fees later approved by the court for the services performed. Dees Lodging, *supra*. As a pre-petition and post-petition² fund taken by an attorney is, to the extent of the approved fees, collateral to secure payment of the approved fees and

² See In re Bread & Chocolate, Inc., 148 B.R. 81 (Bankr. D.D. Colo. 1992) (including both pre-petition and post-petition retainers in the fund and holding that such monies are property of the estate until awarded to the attorney by the Court); see also In re K & R Mining, Inc., 105 B.R. 394 (Bankr. N.D. Ohio 1989) (including post-petition retainers as part of the attorney's possessory security interest)

cannot be used to satisfy the debts owed claimants prioritized under §507, regardless of their priority. Id. The “retainer enables the debtor’s attorney to avoid the subordination of the Chapter 11 expenses of administration to those incurred in administering the Chapter 7 estate mandated by Section 726(b)”. In re K & R Mining, supra citing In re Burnside Steel Foundary Co., 90 B.R. 942 (Bankr. N.D. Ill. 1988). Hence, to the extent of any approved fees, the fund held by counsel is deemed collateral securing payment of the approved fees and is not available to satisfy even other administrative expenses. Id. In re K & R Mining, Inc., 105 B.R. 394 (Bankr. N.D. Ohio 1989).

To the extent Mr. Saul is a secured creditor in Debtors’ bankruptcy cases, §327 would disqualify him as Debtors’ counsel in the Chapter 7 cases.³ However, there is an exception to §327 where the attorney holds a pre-petition and post-petition claim for money owed for future bankruptcy services and/or where the legal fees that accrued pre-petition have been incurred solely for services rendered in contemplation of and in connections with the bankruptcy case. See In re Adam Furniture Industries, Inc., 158 B.R. 291 (Bankr. S.D. Ga. 1993) *citing In re Roberts*, 46 B.R. 815, 849 (Bankr. D. Utah 1985) *aff’d in part, rev’d in part*, 75 B.R. 402 (D. Utah 1987); In re Bread & Chocolate, supra; In re K & R Mining, supra. Therefore, an

³ 11 U.S.C. §327 provides in pertinent part: “(a) Except as otherwise provided in this section, the trustee, with the court’s approval, may employ one or more attorneys... that do not hold or represent an interest adverse to the estate, and that are disinterested persons...”

attorney who represents a debtor in the debtor's chapter 11 case and subsequently converted chapter 7 case may continue such representation provided that his claim is for legal services rendered in the bankruptcy case. Mr. Saul's financial interest in the bankruptcy estate is within this exception.

At the hearing, I determined that the evidence clearly justified an interim award of \$85,000.00 and such award was reasonable compensation for Mr. Saul's services to date of application.

Accordingly, it is ORDERED that Mr. Saul is awarded reasonable attorney's fees in the amount of \$85,000.00 and may apply the moneys held by him to satisfy this award.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 28th Day of August, 2003.